

AUG 11 2006

FEDERAL ELECTION
COMMISSION
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FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5664

DATE COMPLAINT FILED: June 13, 2005

DATE OF NOTIFICATION: June 20, 2005

LAST RESPONSE RECEIVED: December 15,
2005

DATE ACTIVATED: January 30, 2006

EXPIRATION OF STATUTE OF LIMITATIONS:

March 1, 2009

COMPLAINANT:

Gerald L. McMillian

RESPONDENTS:

International Union of Painters and Allied Trades
District Council 53
Clarence E. Mitchell, Sr.

RELEVANT STATUTES AND
REGULATIONS:

2 U.S.C. § 431(8)(A)
2 U.S.C. § 441b(a)
11 C.F.R. § 100.52(d)(1)

INTERNAL REPORTS CHECKED:

Federal Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

Complainant Gerald McMillian, a former long-time employee of the International Union of Painters and Allied Trades District Council 53 ("District") in West Virginia, alleges that the District and its Business Manager/Financial Secretary, Clarence E. Mitchell, Sr., made prohibited in-kind contributions from a labor organization to the John Kerry/John Edwards ("Kerry/Edwards") presidential campaign. According to McMillian, Mitchell instructed District employees to take part in campaign activities, including Kerry/Edwards campaign events, on District and personal time, and that McMillian personally attended such events during normal

1 office hours and using a union-owned vehicle. McMillian further claims that employees were
2 instructed to mischaracterize participation in these events on weekly work reports, and to reflect
3 only 40 hours of work even when actual hours exceeded that amount. McMillian states that as
4 many as eight full-time employees were present at Kerry campaign rallies, and suggests that the
5 amount of in-kind contributions would easily exceed \$10,000. McMillian also alleges that once
6 he told Mitchell that he planned to file a complaint with the Commission, he was charged with
7 and sanctioned for misconduct by the District, removed from an official position, received
8 threats, and eventually felt forced to resign his employment.

9 The District and Mitchell deny all the allegations, and in response to the complaint have
10 produced eleven affidavits: two from Mitchell and Richard Hackney, the Assistant Business
11 Manager, and nine others from Business Representatives of various locals, all of whom indicate
12 that they answer directly to Mitchell and Hackney.¹ Because the sworn statement of the
13 complainant directly conflicts on the key facts with the sworn statements submitted by
14 respondents, an investigation is appropriate. While the unusual number of affidavits from
15 respondents casts doubt on the allegations asserted here, the very nature of the allegations –
16 coercion by top officials – and the fact that all the sworn statements have been produced by
17 either those officials or employees who report directly to them, calls for some inquiry, including
18 interviews to assess credibility. We therefore recommend that the Commission find reason to
19 believe that the District and Mitchell violated the Act so that we may investigate the allegations.

20 **II. FACTUAL AND LEGAL ANALYSIS**

21 **A. Background**

22 The District is a state-level subdivision of the International Union of Painters and Allied
23

¹ One affiant, Kenneth Bird, describes his title as "Service Representative/Organizer."

1 Trades ("IUPAT"). The District is further subdivided into a number of local unions, each of
2 which elects one member every three years to be the local union's business representative to
3 work full-time at District headquarters as a paid District employee. Supplemental Complaint at
4 1, see IUPAT website, www.iupat.org/about/dcs_lus.html. McMillian states he was elected as
5 his local union's business representative to the District six times and served in this position for
6 twenty years. Supplemental Complaint at 1. At the time of the alleged violations, Mitchell was
7 "Business Manager/Financial Secretary" of the District and McMillian's direct supervisor.
8 Affidavit of Clarence E. Mitchell, Sr., July 20, 2005, at ¶ 1; Complaint at 1.

9 McMillian alleges that starting in March 2004, the District became very involved in the
10 Kerry/Edwards presidential campaign. Complaint at 1. He asserts that Mitchell directed him
11 and other District employees to participate in campaign events during work hours. *Id.* at 2.
12 According to McMillian, for any pro-Kerry/Edwards or anti-Bush rallies within driving
13 distance, they were to gather "as many [union] members as the union car would hold and put
14 them in our black and gold tee shirts which endorsed Kerry and attend these events." *Id.*
15 Additionally, McMillian claims he and other District employees "were required to do precinct
16 walks during the evenings and weekends" and assist with pro-Kerry/Edwards mass mailings to
17 District members. *Id.* Mitchell allegedly told District employees not to document over 40 hours
18 of work a week (*i.e.*, even if participation in political activities boosted their work hours above
19 40) and that weekly work reports showing political activities would be rejected; instead,
20 Mitchell allegedly instructed that such activities should be classified as "educating our
21 membership." *Id.*

22 In a supplement to his complaint, McMillian states that in February 2005, he read a copy
23 of the conciliation agreement in MUR 5268 (KSDCC) and was concerned that he and other
24 District employees might have committed violations of the federal election laws in connection

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1 with the political activities discussed above. See Supplemental Complaint at 1. He claims that
2 after he confronted Mitchell with his concerns in April 2005, and told Mitchell that he planned
3 to file a complaint with the Commission, he experienced various repercussions.² *Id.*

4 In response, the District submitted affidavits from eleven District employees, including
5 Mitchell, that specifically contradict McMillian's allegations.³ The affidavits state that while
6 employees of the District took part in political activities, and some affiants received information
7 about "upcoming political events," they understood that any participation was voluntary and to
8 be done on personal time with their own vehicles. Several of the affidavits flatly assert that
9 McMillian's allegations are "false."⁴

10 In attempting to show that, contrary to McMillian's claim, work reports mentioning
11 political activity were not rejected, the District also provided four of McMillian's weekly reports
12 referencing his participation in political activities. For the week of April 3, 2004, McMillian's
13 weekly report states, "I seen [sic] a large crowd of people making Mr. Bush welcome."
14 McMillian's weekly report for September 11, 2004 mentions his attending a rally with "8 Black

² McMillian states, "I have been taking a thumping since I filed the F.E.C. Complaint [sic]." Supplemental Complaint at 3. He provided documents showing that he was twice brought up on charges for violating the IUPAT constitution, and sanctioned both times. He also states he was removed as a trustee from the District's Health and Welfare Plan, warned of a possible audit of activities he managed, threatened with physical violence by other District employees, given an assignment that would have imposed a hardship, and finally resigned from the District "due to extreme Duress and Harassment [sic]." *Id.* He states he "felt [his] resignation was necessary to avoid possible physical harm and mental anguish" and that "several agencies" with whom he spoke "labeled [his] resignation as a constructive discharge." *Id.* In a supplemental response, the District provided a report by the state unemployment commission denying McMillian unemployment benefits because he "left work voluntarily without good cause involving fault on the part of the employer."

³ The District submitted two responses. One response was received on July 22, 2005 following the initial complaint, and another was received on December 15, 2005 after McMillian filed the supplemental complaint. The second response enclosed additional affidavits concerning the original allegations that were executed in early August 2005, but were not forwarded to the Commission until four months later with the supplemental response.

⁴ McMillian claims that another District employee told him that "Mr. Mitchell had ordered all the District Council 53 Servicing Representatives/Organizers to report to [the union's attorney's office] and sign a document which stated that all of Gerald McMillians [sic] statements that he made to the FEC were not true." Supplemental Complaint at 3.

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Shirts." His report for the week of September 18, 2004 states, "called members for Edwards Rally at Tri-State Airport" and "Attended Edwards Rally." Finally, his weekly report for October 24, 2004 references "very positive results on walk," which may refer to a precinct walk.

B. Analysis

The complaint alleges in-kind contributions from a labor organization to the campaign of a Federal candidate by directing employees to participate in campaign events and conceal their participation by falsely characterizing it on work reports as member education. If the facts as alleged are true, the District and others may have violated 2 U.S.C. § 441b(a), and those violations may be knowing and willful. Notably, each of the key factual allegations, sworn to by complainant and purportedly based on first-hand experience, are denied by the respondents through sworn statements – by the supervisor who allegedly directed the activity and cover-up, his assistant, and nine others who, like complainant, reported to this supervisor during the relevant period.

There is no way to resolve these conflicting accounts without an investigation.]

1 To be sure, the swearing match in this matter is lopsided, which raises doubt about the
2 complainant's credibility. However, where, as here, a complainant alleges under oath that he was
3 directed by his supervisor to engage in prohibited activity and to take steps to conceal that
4 activity on his employment records, the presence of conflicting affidavits from the supervisor and
5 other direct reports should not be considered the end of the matter. This is particularly so in this
6 case where the complainant has alleged reprisals by the employer for filing a complaint with the
7 Commission, and the complainant can point to adverse job actions that, while not necessarily
8 attributable to his filing the complaint, are consistent with his allegations. We believe that some
9 investigation is appropriate to evaluate credibility and determine whether there are other
10 witnesses or documents that shed light on the allegations.⁵

11 This Office recommends that the Commission find reason to believe that the International
12 Union of Painters and Allied Trades District Council 53 and Clarence Mitchell violated 2 U.S.C.
13 § 441b(a) by respectively making and consenting to prohibited in-kind contributions from a labor
14 organization, and authorize an investigation.⁶ Because the District has provided affidavits

⁵ MUR 5268 (KSDCC), which was referred from the Kentucky Office of Attorney General, included allegations that employees were coerced by a labor organization to work on political campaigns and to report these activities as "membership education." During the investigation, KSDCC denied the allegations, which it claimed were made by disgruntled employees. Nonetheless, an investigation confirmed the initial whistleblower's claims that KSDCC violated the Act. *See also* MUR 5437 (SEIU Local 250) (Commission authorized an investigation, which is ongoing, where single complainant alleged, among other violations, that paid staff members of a labor organization were required to work on political campaigns as part of their official job duties, and union respondents denied the allegations).

⁶ We make no recommendations regarding the allegation that the District ordered individuals to paint signs for a state candidate, as this allegation is not within the Commission's jurisdiction. Regarding the complainant's allegation that the District required employees to assist in distributing mailings supporting Kerry to its 1400 members, since a labor organization may make express advocacy communications to its members, it may also direct its employees to assist in such tasks. *See* 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. §§ 114.1(a)(2), (e) and (j) and 114.3(a). The costs of such communications, however, must be reported to the Commission if they exceed \$2,000 for any election. 2 U.S.C. § 431(9)(B)(iii). The complainant did not allege, and we do not have any information concerning, whether the District violated this reporting obligation with respect to its mailings supporting Kerry. If our investigation uncovers information indicating such a violation may have occurred, we will recommend appropriate action.

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denying the complainant's allegations, we are not recommending that the Commission's
determination at this time include a knowing and willful component.

IV. RECOMMENDATIONS

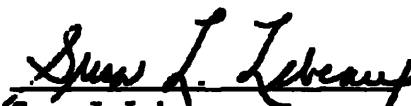
1. Find reason to believe that the International Union of Painters and Allied Trades District Council 53 violated 2 U.S.C. § 441b(a).
2. Find reason to believe that Clarence E. Mitchell, Sr. violated 2 U.S.C. § 441b(a).
3. Approve the attached Factual and Legal Analyses.
4. _____
5. Approve the appropriate letters.

8/11/06
Date

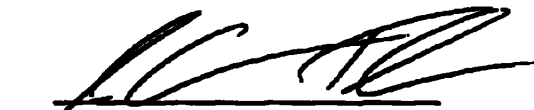
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